

Joseph Bunker Lessee of Frances
Bokenham, late Widow and
Relict of Captain William
Bokenham, now Dame Frances
Bukingham, Wife of Sir
Owen Buckingham. } Plaintiff

And William Cooke and Robert
Bokenham formerly Commander
of Her Majesties Ship August, } Defendants.
and Brother and Heir of the said
William Bokenham.

In a Writ of Error brought to reverse a Judg-
ment given in the Queen's-Bench for the De-
fendant upon a special Verdict in Ejectment.

The Defendant's C A S E.

3d May 1692.
Will.

WILLIAM BOKENHAM Husband of the said Dame Frances, being Commander of the *Grafton* Man of War, and just bound to Sea, did upon that Occasion, and to make a Disposition of his Estate in case he should lose his Life in that Expedition, not knowing (as the Words of his Will are) how it might please God to deal with him, made his Will dated the Third of May 1692, wherein is contain'd a Devise to his Wife in these Words. *I do hereby give, devise and bequeath unto my well-beloved Wife Frances Bokenham, all such Sum and Sums of Money as now is or hereafter shall grow due to me from their Majesties, for my own and Servants Service either by Sea or Land, as also all such Sum and Sums of Money, Lands, Tenements, Goods, Chattels and Estate whatsoever, wherewith at the Time of my Decease I shall be possessed or invested, or which shall then, or of right doth appertain unto me. And I do hereby nominate and appoint her the said Frances Bokenham my well-beloved Wife to be the whole and sole Executrix of this my last Will and Testament.*

N O T E,
The Words of the Will taken from a common printed Form, which see on the Back.
21st March 1700.
The Lands in Question purchas'd.
A Writ of Dower first brought by Dame Frances.
Afterwards a Title set up to the whole Estate.
Special Verdict.

THE general Words of Gift are copy'd Verbatim by the Clerk of the Ship who drew the Will from a common printed Form for Seamen's Wills, then much in Use in the Fleet, and seem not to be incerted by the Devisors Direction, or upon any View that he ever should be Owner of these or any Lands, for it was near nine Years after the making of this Will, (viz.) 21st March 1700, that he having considerably improv'd his Estate purchased the Lands in Question, being about Two Hundred Pounds per Ann. and lying in Kent, and of the Nature of *Gavelkind*.

AFTER his Death his Wife being conscious the Inheritance of this Estate was never design'd for her, brings a Writ of Dower against the Defendant, allowing thereby the Estate to be in the Defendant, and all her Pretence to be only her Dower in a Moyety during her Widowhood.

BUT afterwards set up a Title to the Purchased Lands by this Will, and brought an Ejectment, wherein a special Verdict was found, and upon that the present Judgment was given.

THE Special Verdict finds the Will the Third of May 1692 as above, and that the Devisor was not then seiz'd of those or any other Lands, that Sir George Wheeler and others were seiz'd in Fee of the Lands in Question, and by Lease and Release of the 20th and 21st of March 1700, convey'd the same to the said William Bokenham and his Heirs, **To the Use of him his Heirs and Assigns**, that he afterwards dy'd, seiz'd of these Lands the 9th of November 1702, that the Lands are of the Nature of *Gavelkind*, and that the Custom of *Gavelkind* is that any Tenant being seiz'd of these Lands in Fee, may devise the same by Will in Writing, that the Devisor dy'd without Issue, and the Defendant Robert Bokenham is his Brother and Heir.

The Question.

THE single Question upon this Verdict is, whether the Lands that were purchas'd almost Nine Years after the making the Will, can by Law pass by this Will, there being no new Publication of it after the Purchase.

AND it is humbly hop'd they cannot by the Rules of Law pass by this Will for these Reasons amongst others.

- I. IN Regard that it seems contrary to Reason, and is against the known Rules of the Common Law of England, that a Man should make any Conveyance or Disposition of Land, which he hath not at the Time of making such Conveyance or Disposition.
- II. THAT the Statute 32 H. 8. which gives the Power of disposing Lands by Will, enables only Persons having Lands to make such Disposition thereof, and gives no Power to Persons not having Lands, to make a Disposition of such as they shall have.
- III. THAT the Custom of *Gavelkind* is in Effect the same, being expressly found in this special Verdict, to be that Tenants seiz'd of Lands may devise them by Will.
- IV. THAT therefore to support a Will either upon the Statute or the Custom, it is necessary to shew that the Devisor was seiz'd of the Lands devised, and being so seiz'd made his Will; And so is the constant Course of Pleading, and not a President otherwise; and this Will therefore cannot pass these Lands, because the Party was not seiz'd thereof when he made it.
- V. THAT the unanimous Opinion of all the Judges of the Court of *Queen's-Bench*, upon this Point in the present Case, is supported by a Judgment given for the now Defendant in the *Common Pleas*, by the unanimous Opinion of that Court on a like special Verdict found upon the same Will, and both of 'em by a former Resolution of all the Judges of England upon solemn Argument in the *Exchequer-Chamber*, 30th Eliz. upon the same Point, in the Case of *Butler and Baker*, with other concurrent Judgments, and not one Judgment or Resolution to the contrary.
- VI. THAT this having been so solemnly settled, and so long received as a Rule of Property, that a Man cannot make a Will of any Lands before he has a Title in 'em, to overthrow it now might be to overthrow the Titles of many Great, perhaps Noble Families, and would introduce infinite Confusion, and a Distrust of every other Point of Law how plain soever.

WHEREFORE it is humbly hop'd their Lordships will affirm the Judgment of the Court of *Queen's-Bench* in this Case, with such Costs as their Lordships shall think suitable, to the great Vexation and Expence the Defendant has undergone in a Case so plain and so fully settled.

N O T E, The said Dame Frances has had a Writ of Dower for these Lands, which she dropt, a Bill in Chancery, which that Court has dismissed, Two Special Verdicts in two several Courts upon this Point, in both which the Defendant has got Judgment, and he has been at above 500 l. Expence when he could very ill spare it, and when his Service in the Fleet rendred him unable to attend Affairs of this sort; and he thinks this the more hard in his Brother's Widow, because by this Will she has the whole personal Estate, which she has confess'd to be near 5000 l. and is really near 10000 l. besides all her (w.) Estate.

J. Jekyll.

T. Parker.

I the said A. B. considering the Uncertainty of this Tran-
 scitory Life, do make and declare the said Presents to con-
 tain my last Will and Testament; that is to say, All such
 things, Sum and sums of Money, Lands, Tenements,
 Goods, Chattels, and Estate whatsoever, wherewith at
 the time of my decease I shall be possessed or invested, or
 which shall then belong or of right appertain unto me. I
 do give, devise and bequeath unto A. B. and do hereby no-
 minate and appoint him the said A. B. to be the whole and
 sole Executor of this my last Will and Testament, and do
 revoke all former Wills and Deeds of Gift by me at any time
 heretofore made, and do ordain these Presents to stand, and
 be for, and as my only last Will and Testament. In Witness
 whereof I have hereunto set my Hand and Seal the

*The Printed Form of a Seaman's Will,
 which was Printed with a Letter of
 Attorney, and much in use in the Fleet
 till it was vacated by the Act of Par-
 liament 9th and 10th Will. 3 cap. 41.*

Joseph Bunker, Plaintiff.

William Cooke, and Robert Bo-
 kenham formerly Commander of
 Her Majesty's Ship August,
 Defendants.

On a Writ of Error in Parliament.

The Defendant's CASE.

To be heard on ~~Tuesday~~ ^{Tuesday} the
 20th Day of February.

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